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VIA HAND DELIVERY

Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Director of Operations and Merger Enforcement
Antitrust Division, Department of Justice
Room 10103
601 D Street, NW
Washington, DC 20530

Re: Comment to Notice of Proposed Rulemaking
Antitrust Improvements Act Rules -- Proposed Rules 802.50 and 802.51

Dear Sirs or Madams:

In Sections 802.50 and 802.51 of the proposed rules, the FTC proposes to enlarge the period for which sales in or into the United States are calculated in determining whether a foreign target's nexus to United States commerce is sufficient to justify premerger notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"). We believe that the FTC's proposal requires modification for a number of reasons. First, in their overbreadth, we believe the proposed rules fail to properly address the concern cited by the FTC for the change. Second, the proposed rules improperly discriminate among transactions based solely on a transaction's timing. Further, the rule which sets forth the time in which the calculation must be made is unclear and imposes undue burdens upon the parties that could generate unforeseen delays in transactions.

We propose an alternative test that we believe directly addresses the FTC's principle concern, and does so in a far less discriminatory manner. Rather than considering sales in or into the United States for an acquired entity's "most recent fiscal year, combined with such sales to date since the end of that fiscal year," the rules should look to the greater of (a) sales in or into the United States in an acquired person's last fiscal year and (b) sales in or into the United States over the last four available fiscal quarterly periods. Further, the parties ought to be entitled to rely on a consistent cut-off date in

calculating sales in or into the United States, regardless of whether the transaction proves to be subject to notification or exempt. The parties should be entitled to measure sales in or into the U.S. as of the end of the most recent quarterly period available as of the date the parties enter into an agreement, so long as the end of that quarterly period is no older than 135 days (i.e., 45 days after the close of the last quarter). We believe this (a) will provide the parties certainty, (b) allows sufficient time for parties to gather information that is not always readily available, (c) minimizes the burden imposed by rules requiring aggregation of sales for a fiscal year that has not yet ended, (d) properly takes into account the current sales trends of a target, and (e) allows most parties to rely upon their existing reporting practices.

The FTC's Proposal

Quite properly, the Act and the rules and regulations promulgated thereunder exempt acquisitions of foreign assets and/or stock of foreign issuers where the nexus to U.S. commerce is sufficiently small. As a barometer of that nexus, the rules have historically looked to sales in or into the U.S. attributable to the foreign assets or foreign issuers being acquired. Thus, under Sections 802.50(a)(2), 802.50(b)(2) and 802.51(b)(2) of the current rules, sales in or into the U.S. are measured by the sales derived in an acquired entity's most recent fiscal year.

Under the proposed rules, however, the FTC seeks to enlarge the period within which the relevant sales are measured. The proposed rules seek to look to sales generated in the "most recent fiscal year, combined with such sales to date since the end of that fiscal year" as a barometer of the nexus to U.S. commerce. Thus, under proposed Section 802.50(a), an acquisition of foreign assets by either a United States person or a foreign person may be subject to reporting requirements if the sales attributable to such assets in or into the U.S. exceeds $50 million "during the acquired person's most recent fiscal year, combined with such sales to date since the end of that fiscal year." Similarly, under proposed Section 802.51(a)(2), an acquisition by a U.S. person of stock of a foreign issuer may be a fileable event if the issuer "made aggregate sales in or into the U.S. of over $50 million in its most recent fiscal year, combined with such sales to date since the end of that fiscal year," and under proposed Section 802.51(b)(2), an acquisition by a foreign person of stock of a foreign issuer may be a fileable event if the acquiring person would acquire control of an issuer that "made aggregate sales in or into the U.S. of over $50 million in its most recent fiscal year, combined with such sales to date since the end of that fiscal year."

Under Sections 802.50(c) and 802.51(d) of the proposed rules, "any determination of sales in or into the U.S. must be made within 60 calendar days prior to the filing of notification or if such notification is not required, within 60 calendar days prior to the consummation of the acquisition."

The Proposal is Overbroad, Discriminatory and Burdensome

The FTC asserts in the Statement of Basis and Purpose that the proposal to include sales generated since the end of the last fiscal year is "intended to ensure that where U.S. sales generated by foreign assets and voting securities have been trending steeply upward prior to the acquisition, a filing will be required if that trend has resulted in over $50 million in U.S. sales." However, we believe the

proposed solution responds to the stated concern in an unnecessarily overbroad, as well as discriminatory, manner. To the contrary, the proposed rules could, and likely will, frequently create a fileable event even where the U.S. nexus of the acquired assets or issuer is trending steeply downward. Since the rules require aggregation of sales in or into the U.S. for a longer period, the $50 million threshold may nevertheless be crossed even where such sales are diminishing. Moreover, the FTC's proposed solution seems to improperly discriminate among acquisitions based solely on the timing. An acquisition that closes toward the end of an acquired person's fiscal year would be more likely to trigger notification than the exact same acquisition closing at the very beginning of an acquired person's fiscal year, even if the U.S. sales of the subject stock or voting securities are trending downwards. This anomalous result occurs simply because the sales in or into the U.S. are calculated for a shorter, or longer period, depending upon a transaction timing.

A Hypothetical

As an illustration, consider the following hypothetical. X intends to acquire a factory owned by Y located in France for $60 million. Y sells products manufactured by the factory directly to U.S. customers. In its last fiscal year, the factory generated U.S. sales of $36 million (an average of approximately $3 million per month). Since the end of its last fiscal year, Y has begun to refocus its operations to target non-U.S. customers. Consequently, the monthly sales in or into the U.S. attributable to the factory's output over the 11 months since the end of its last fiscal year have been trending steadily downward in the following manner:

Month	U.S. Sales	Aggregate U.S. Sales (Post Fiscal Year)	Aggregate U.S. Sales (Including Last Fiscal Year)
1	$3 million	$3 million	$39 million
2	$2.5 million	$5.5 million	$41.5 million
3	$2.2 million	$7.7 millions	$43.7 million
4	$2.0 million	$9.7 million	$45.7 million
5	$1.5 million	$11.2 million	$47.2 million
6	$1.2 million	$12.4 million	$48.4 million
7	$1.0 million	$13.4 million	$49.4 million
8	$700,000	$14.1 million	$50.1 million
9	$400,000	$14.5 million	$50.5 million

10	$200,000	$14.7 million	$50.7 million
11	$100,000	$14.8 million	$50.8 million

Under the proposed rules, the $50 million threshold would be satisfied if the acquired person had to include the sales of the first eight months since the end of the last fiscal year in its calculation of sales in or into the U.S., even though the U.S. sales are trending downward. On the other hand, if the exact same transaction were to have occurred one month earlier, it would have been exempt since the total U.S. sales calculated under the proposed rule would have been only $49.4 million (since it would have taken into account only seven months of sales since the end of the last fiscal year). Moreover, if the transaction were to be postponed for a couple of months -- until after the close of the current fiscal year -- it would be exempt since the relevant U.S. sales would likely be around $15 million. This incongruous result is driven solely by the timing of the transaction, rather than any actual difference in the substantive antitrust issues or the sales in or into the U.S. of the target.

An Alternative Proposal

While we believe the FTC's concern may be warranted, and while it is often true that the results of the last fiscal year do not necessarily reflect the current level of operations of a target, to the extent the FTC believes it appropriate to consider sales generated since the end of the last fiscal year, a more sensible and fair analysis would look to the greater of (a) sales in or into the United States in an acquired person's last fiscal year and (b) sales in or into the United States over the last four available fiscal quarters of operations. If either period reflects sales in or into the United States in excess of $50 million, then an acquisition would be subject to filing obligations.

This test would capture all acquisitions of foreign stock or assets that have historically surpassed $50 million in sales in or into the United States for a specific 12-month period, whether that snapshot is more, or less, recent. To the extent an acquired person has recently increased its focus on its U.S. customer base, an analysis of the most recent four available quarters of operations should properly account for this increased presence. At the same time, our proposed structure would avoid unnecessarily capturing an acquisition that surpasses the $50 million threshold simply because the parties are required to include sales from, for example, an 18 or 19-month period, rather than a 12-month period -- as will no doubt occur with the FTC's proposal. And, it would treat all acquisitions equally since the examined window would, in all cases, be a 12-month period.

A Consistent, Clear and Manageable Cut-Off Date Should Be Used

The FTC's proposal requires a different calculation, depending upon whether a transaction is subject to filing requirements (in which case the calculation "must be made within 60 calendar days prior to the filing of notification") or is exempt (in which case the calculation "must be made within 60 days prior to the consummation of the acquisition").

The first problem with this proposed rule is that it is simply unclear. While it makes clear when the determination must be made, it does not make clear the period that must be included in the calculation. Is the rule intended to mean that the calculation must be for a period that ends not more than 60 days from the date of notification or consummation? If so, the language of this rule needs to be clarified.

Does the calculation require an aggregation of sales in or into the United States up to a particular day? If it does, it would obviously create an unreasonable burden upon the resources of the acquired person to keep calculating aggregate sales on a day-to-day basis. Does it require calculation up to the end of a particular month? While this may be somewhat more reasonable, it would still create unreasonable burdens as many entities, both foreign and domestic, do not have sales information readily available. If they do record monthly sales, there is frequently a significant lag-time in that information becoming available.

Moreover, given the uncertainty of actual closing dates in many transactions, the fact that there are potentially different calculations for fileable and exempt transactions imposes a continuing unreasonable burden upon acquired persons. For instance, an acquired person may calculate sales in or into the U.S. on the day an agreement is signed (setting aside the question of what cut-off date is to be used for the calculation) and determine that such sales are less than $50 million. The parties may also reasonably expect the transaction to be consummated within two months. Consequently, the parties may well believe that no HSR filing will be required. However, if an unforeseen last minute issue arises so that the closing date is delayed beyond sixty days from the signing date, the rules would require the acquired person to recalculate sales. Since, in theory, additional incremental sales would now need to be included, the sales in or into the U.S. may well be over $50 million, even though, like the hypothetical presented above, the overall sales in or into the U.S. may be trending downward. Thus, the transaction would now be fileable, and the parties would need to prepare HSR filings at the last minute, thereby further significantly delaying the transaction.

In order to avoid undue burden on the parties, to provide the parties with certainty with respect to whether a proposed transaction must be notified, as well as to take into account recent sales trends of the target, the parties should be entitled to calculate sales in or into the U.S. as of the end of the most recent quarterly period available as of the date the parties enter into an agreement, so long as the end of that quarterly period is no older than 135 calendar days (i.e., 45 days after the close of the last quarter).[1] This timing for the collection and reporting of quarterly revenue is consistent with quarterly reporting requirements imposed by the Securities and Exchange Commission on most reporting companies and is also consistent with the requirements for the delivery of financial information to typical lenders. Consequently, we believe this proposal (a) provides the parties necessary certainty,

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[1] Thus, assuming an acquired person reports on a calendar year basis, a transaction that signs between February 16 through May 15 would be required to calculate sales for the previous calendar year; a transaction that signs between May 16 and August 15 would be required to calculate sales for the four quarters ended March 31; a transaction that signs between August 16 and November 15 would be required to calculate sales for the four quarters ended June 30; and a transaction that signs between November 16 and February 15 of the following year would be required to calculate sales for the four quarters ended September 30.

even where closing is unexpectedly delayed, (b) allows sufficient time for parties to gather information that is not always readily available, (c) minimizes the burden imposed by rules requiring aggregation of sales for a fiscal year that has not yet ended, and (d) properly takes into account the current sales trends of a target since the end of the most recent fiscal year.

We propose that the foregoing calculation be utilized in determining the sales for the second prong of our 12-month sales test. To the extent the agencies decline to adopt our 12-month sales test, we would still urge the agencies to adopt our suggestion regarding a fixed, consistent cut-off date in determining a target's total sales in or into the U.S. since the end of the most recent fiscal year -- measured from the date the subject agreement is signed -- whether a transaction is subject to notification or exempt.

An Apparent Section Numbering Error

In addition to the substantive issue raised above, we also note the presence of an apparent section numbering error. We believe that the proposed Section 802.51(b)(3) should be renumbered as Section 802.51(c). We do not see any reason why the requirement to aggregate sales in or into the U.S. and U.S. assets of multiple foreign issuers whose control is being acquired should apply to acquisitions by foreign persons but not to acquisitions by U.S. persons.

In the event you would like to discuss the foregoing, please contact Jonathan J. Konoff at (212) 728-8627.

Respectfully submitted,

Steven J. Gartner